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NO. _____

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1990

EMORY C. PARRISH, *et al.*, and GEORGIA ASSOCIATION OF EDUCATORS, INC.,
Petitioners,

v.

EMPLOYEES' RETIREMENT SYSTEM OF GEORGIA, *et al.*, and TEACHER RETIREMENT SYSTEM OF GEORGIA, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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March 6, 1991

QUESTION PRESENTED

Does a State violate the Contract Clause of the federal constitution (Art. I, § 10) by imposing an income tax on the vested retirement benefits of retired state employees whose benefits were exempt from the tax?

THE PARTIES

The proceedings below involved two cases which were decided together by the Georgia Supreme Court. The first case was brought by individual retirees and the second by the Georgia Association of Educators. In both cases, the defendants were public bodies that administered the State's retirement systems.

Parties to the first case (S90A0575) were appellants (now petitioners) Emory C. Parrish, James H. Quarles, Bessie Jo Johnson, and Ralph C. Moor. The appellees (now respondents) were the State of Georgia, the State Department of Revenue of Georgia, Marcus E. Collins, Sr., as the Commissioner of the State Department of Revenue, the Employees' Retirement System of Georgia, Rudolph Johnson as the Director of the Employees' Retirement System of Georgia, and the Board of Trustees of the Employees' Retirement

System of Georgia and its individual members, Joe Edwards, Charles E. Storm, William E. Strickland, Robert T. Willis, Jr., Warren D. Evans, G. W. Hogan, and B. Thomas Conger.

Parties to the second case (S90A0576) were the petitioner Georgia Association of Educators, Inc., and the respondent Teacher Retirement System of Georgia.

The petitioners ask that their cases remain joined for purposes of the writ of certiorari and that the cases be reviewed and decided as one by this Court.

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EMPLOYEES' RETIREMENT SYSTEM OF GEORGIA, *et al.*, and TEACHER RETIREMENT SYSTEM OF GEORGIA, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

The petitioners, Emory C. Parrish, *et al.*, and Georgia Association of Educators, Inc., respectfully ask that a writ of certiorari issue to review the judgement and opinion of the Supreme Court of Georgia, entered in the joined cases of Parrish, *et al.* v. Employees' Retirement System of Georgia, *et al.*, and Georgia

Association of Educators v. Teacher Retirement System of Georgia on December 3, 1990.

OPINION BELOW

The opinion of the Supreme Court of Georgia has not yet been reported. It is reprinted in the appendix hereto, p. 1a, *infra*.

JURISDICTION

The Supreme Court of Georgia on December 3, 1990, entered a judgement and an opinion stating that Georgia's new income tax law (House Bill No. 1 EX), which imposes a tax on retirement benefits that vested under a statute expressly exempting these benefits from the tax, is not an impairment of contract in violation of the Contract Clause of the federal constitution (Art. I, § 10). See pp. 7a and 8a, *infra*.

Petitioners' Motion for Reconsideration was denied by the court below on December

19, 1990. See p. 1b, *infra*.

The jurisdiction of this Court to review the judgement of the Supreme Court of Georgia is invoked under 28 U.S.C. § 1257 (3).

ARTICLE INVOLVED

U. S. Constitution, Art. I, § 10. *Powers forbidden to the States.*

> No State shall ... pass any ... Law impairing the Obligation of Contracts ....

STATEMENT OF THE CASE

The court opinion below was divided. The facts, however, are not in dispute. A contract existed between the petitioners and the State, and the State changed the contract.

The petitioners are parties to a pension plan established by the State. The petitioner Emory C. Parrish worked for the Georgia Highway Department for over 30 years, and then retired to enjoy the state benefits he always had understood were to

to be his at road's end. Passage of the new income tax law cost him almost $3000 in 1990.

The benefits in petitioners' pension plan had vested. The pension by statute included an exemption of retirement benefits from state income tax: "The right to a pension, annuity, retirement allowance ... or any other right accrued ... are: (1) Exempt from any state, county, or municipal tax ...." *Official Code of Georgia Annotated*, § 47-2-332(a). But House Bill No. 1 EX in 1989 amended Code Section 48-7-27 so as to revoke this exemption. That petitioners' tax exemption was part of their pension was recognized by the court below: "Since each retiree contributed to the retirement system and performed services while the law exempting retirement benefits from state income taxation was in effect, *that law became part of the contract of em-*

ployment of the retiree." See pp. 2a and 3a, *infra*; emphasis added.

More than 45,000 state and teacher retirees in Georgia have been affected. Projected revenues in 1990 from the new state income tax on these retirees was $8.1 million. The State's fiscal gain, therefore, was considerable and at a time of shortfall in revenues. However, the impairment of individual rights, the pension rights at stake here, is substantial. The state retirement benefits of retirees in question are not large ($897 per month on average for retired state employees and $1170 for teachers). Cuts at the margins of these incomes, as by the newly imposed six-percent state income tax, obviously have impact.

The federal question in this case is state impairment of contract obligations in violation of the Contract Clause. The federal question was first raised in the

original Complaint by petitioners Parrish, *et al.*, in Count One, paragraph 33, where the language of the Contract Clause was cited. Before the Georgia Supreme Court, the Contract Clause issue was specifically raised in the Brief of Appellants, as Question 1 of Questions Presented: "Is House Bill No. 1 EX ... unconstitutional as applied to Appellants and the Class members as an impairment of the obligation of contract in violation of the Georgia and U. S. Constitutions? (Enumeration of Error 1.)." [Brief of Appellants, Feb. 12, 1990, p. 2]

The Georgia Supreme Court, however, found no violation of the Contract Clause, on the basis that the State was "dealing with 'a matter of local policy'" to which the Contract Clause was alleged to have no force and because the State had reserved in itself the power to change the terms of contracts. See pp. 3a, 7a

and 8a, *infra*.

REASONS FOR GRANTING THE WRIT

I.

The Georgia Supreme Court's ruling clearly and directly conflicts with UNITED STATES TRUST CO. v. NEW JERSEY, 431 U.S. 1 (1976), where this Court found that the Contract Clause retains a vital and operative core for contracts in which the State is a party and has financial self-interest.

In *United States Trust Co.*, as here, the State was a contracting party. The Court held that the State, simply because its view of the public interest might change, could not renege on its statutory promise not to reduce reserves pledged as security for Port Authority bonds. As stated by Justice Blackmun, "complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake." 431 U.S. at 26.

When a State changes its own contracts, it must meet a high burden of justifi-

cation. At the very least, it must show the "necessity" of the impairment. 431 U.S. at 29 (requiring a "determination of necessity," which determination the State failed to meet.) A simple utilitarian or perhaps self-serving derivation by the State of public benefit versus individual loss will not suffice, as Justice Blackmun again made clear:

> a State cannot refuse to meet its legitimate financial obligations simply because it would prefer to spend the money to promote the public good rather than the private welfare of its creditors.

431 U.S. at 29.

In the instant case, the Georgia Supreme Court failed to impose any burden of justification at all, much less one of necessity. The opinion below is devoid of any attempt whatsoever to meet the burden of justification required by this Court. Instead, the court below was totally deferential to legislative perogative in

its forfeiting statement that "we are dealing with 'a matter of local policy, like a system of taxation' ...." See pp. 7a and 8a, *infra*.

The stark failure of the Georgia Supreme Court to apply, or even to acknowledge, the standards of *United States Trust Co.* v. *New Jersey* in public contracts is a patently clear instance of reversible legal error.[1]

II.

The State's attempt to use its reserved powers to revoke a tax exemption violates controlling federal law. Under the Contract Clause and for vested contract rights, such exemptions cannot be retrospectively revoked. UNITED STATES TRUST CO. v. NEW JERSEY, 431 U.S. at 24-25; COOMBES v. GETZ, 285 U.S. 434 (1931).

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[1] Moreover, this Court's own construction of the Contract Clause, in *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 235, 241-242 (1977), and in relation to pension plans, should not be forgotten:

> [T]he Contract Clause remains part of the Constitution. It is not a dead letter .... If the Contract Clause is to retain any meaning at all, however, it must be

In *United States Trust Co.*, Justice Blackmun explained that the case involved "a [state] financial obligation and thus as a threshold matter may not be said automatically to fall within the reserved powers that cannot be contracted away." 431 U.S. at 24-25. Respecting the Contract Clause, Blackmun alluded that a reserve power clause that purports to give a State the power "to deny or change the effect of [a] promise, is an absurdity." 431 U.S. at 25 & n.23.[2]

In the present case, the court below committed such an "absurdity." The court

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understood to impose *some* limits upon the power of a State to abridge existing contractual relationships, even in the exercise of its otherwise legitimate police powers.

[2] Quoting *Murray* v. *Charleston*, 96 U.S. 432, 445 (1878). See also *Continental Illinois National Bank* v. *Washington*, 696 F. 2d 692, 698 (9th Cir., 1983): "A promise in a contract that gives one party the power 'to deny or change the effect of the promise, is an absurdity.'"

held that the retirees' exemptions were irrevocable, and relied heavily on the argument that irrevocable exemptions were forbidden by the Georgia Constitution, which provides that:

> The state may not suspend or irrevocably give, grant, limit, or restrain the right of taxation and all laws, grants, contracts, and other acts to effect any of these purposes are null and void. Except as otherwise provided in this Constitution, the right of taxation shall always be under the complete control of the state.

See p. 18a, *infra*. However, this perceived no-irrevocable-tax-exemption provision is only an unremarkable assertion of state sovereignty. The provision merely puts the legislature on notice that it cannot in perpetuity give away the State's power to tax. In any event, the dissent below sensibly noted that the provision must be read in light of what is "otherwise provided in" the Georgia Constitution, which specifically provides for a retirement system. See p. 19a, *infra*. It

must also be noted that the Georgia Constitution, as does the federal constitution, specifically protects against impairment of contracts and retroactive legislation. Hence, the State of Georgia cannot be allowed to practice the "absurdity" of reading backwards to grant itself relief of vested contractual obligations.

While the reasoning of the majority below is unclear,[3] the result is not. The result is that the State arrogates reserved powers to change the contract, and this arrogation was used to defeat the retirees' claim of contract rights. But this

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[3] In a crucial passage (see p. 7a, *infra*), the majority tried to explain its holding:

> That the retirement benefits paid to each retiree will not be paid to or on behalf of that retiree in perpetuity does not render the tax exemption revocable. As to each of these retirees, the tax exemption is irrevocable, and that is untenable in light of [the no-irrevocable-tax-exemption provision in the Georgia Constitution]. We therefore conclude

construction of reserved powers is both specious and unjust. It is also contrary to controlling federal law. As quoted above, in the context of public contracts, a reserve clause that purports to give the State the power "to deny or change the effect of [a] promise, is an absurdity." In *Coombes* v. *Getz*, 285 U.S. 434, 441 (1931), the Court dealt with a provision in the California Constitution that stated: "All laws now in force in this state concerning corporations, and all laws that may be hereafter passed pursuant to this section, may be altered from time to time or repealed." This reserved powers provision was argued in avoidance of a contract obligation. The argument failed.

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that HB No. 1 EX is not an unconstitutional impairment of the retirees' contracts with the State.

Yet there is simply no nexus here between the court's concluding sentence and the two preceding it. Only in this obfuscation can effort be floated to avoid the controlling federal law.

The Court explained that federal decisional standards applied to the contract issue and that:

> this court will give careful and respectful consideration and all due weight to the adjudication of the state court, but will determine ... for itself the meaning and application of state constitutional or statutory provisions said to create the contract or by which it is asserted an impairment has been effected.

285 U.S. at 441.

The Court, stating that "the so-called reserved power is wide, but it is not unlimited," held that reserved powers cannot be used to eliminate a vested contract right:

> The right of this petitioner ... had become fully perfected and vested prior to the repeal of the liability provision .... The repeal put an end to the rule for the future, but it could not and did not destroy or impair the previously vested right of the creditor.

285 U.S. at 442. The Court concluded that "a contractual obligation arose, and the

right to enforce it, having become vested, comes within the protection of ... the contract impairment clause." 285 U.S. at 448.[4]

Clearly, the court below acted contrary to controlling federal standards when it used a reserved-powers construction to validate a state impairment of the retirees' vested rights under their contract with the State. There is a profound difference between using the State's reserved powers to act prospectively for the public good and attempting to use those powers to destroy vested contract rights. Nor can the State be permitted to hide behind the fig leaf of reasonableness and necessity: "When a

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[4] Similarly, in *Continental Ill. Nat. Bank* v. *Washington*, the Ninth Circuit read the reserved-powers provision as applicable to prospective arrangements, but "not to modify pre-existing contracts." 696 F.2d at 699.

State impairs the obligation of its own contract, the reserved-powers doctrine has a different basis." *United States Trust Co.*, 431 U.S. at 23.

CONCLUSION

The court below asked the wrong questions. Instead of focusing on the issue of irrevocability and gauging at length the tenets of Confederate General Toombs and other 19th-century Georgia legislators, the court should have also measured the challenged legislation against the federal decisional standards applied with regard to the Contract Clause. "No answer is what the wrong question begets," as Alexander Bickel reminded us.[5]

For decades, tens of thousands of state employees in Georgia worked with the (false) assurance that they would not be required in retirement to pay the state

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[5] THE LEAST DANGEROUS BRANCH 103 (1962).

income tax. That assurance has been snatched from them, and it is a crass analysis indeed which intimates that they should have read their state constitution more closely--the same constitution on which Georgia's highest court was decades, and with furtive glances back to the 19th century, in assaying as fool's gold the state promises mined out to these people.

The instant case should be reviewed and remanded to the Supreme Court of Georgia for appropriate disposition.

Respectfully,

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APPENDIX

Order and Judgement of the Supreme Court of Georgia

In The Supreme Court of Georgia

Decided: Dec. 3, 1990

S90A0575. Parrish et al. v. Employees' Retirement System of Georgia et al.
S90A0576. Georgia Association of Educators v. Teacher Retirement System of Georgia

BENHAM, Justice.

Appellants are retired teachers and retired employees of the State of Georgia, whose retirement benefits were statutorily exempted from state income tax. See OCGA §§ 47-2-332(a)(1); 47-3-28(a); 48-7-27(a)(4)(A)(i) and (viii). In September 1989 appellants' retirement benefits became subject to state income taxation by the passage and approval of HB No. 1 EX. Appellants maintain that HB No. 1 EX is an unconstitutional impairment of their

contract with the State.

> 1. [A] statute or ordinance establishing a retirement plan for government employees becomes a part of an employee's contract of employment if the employee contributes at any time any amount toward the benefits he is to receive, and if the employee performs services while the law is in effect; and ... the impairment clause of our constitution [1983 Ga. Const., Art. I, §I, Para. X] precludes the application of an amendatory statute or ordinance in the calculation of the employees' retirement benefits if the effect of the amendment is to reduce rather than increase the benefits payable ... [I]f the employee performs services during the effective dates of the legislation, the benefits are constitutionally vested, precluding their legislative repeal as to the employee ....

Withers v. *Register*, 246 Ga. 158 (1)(269 SE2d 431)(1980). See also *Swann* v. *Board of Trustees &c.*, 257 Ga. 450 (360 SE2d 395) (1987). Since each retiree contributed to the retirement system and performed services while the law exempting retirement benefits from state income taxation was in effect, that law became part of the contract

of employment of the retiree. However, since 1877, the Georgia Constitution has provided that

> [t]he state may not suspend or irrevocably give, grant, limit, or restrain the right of taxation and all laws, grants, contracts, and other acts to effect any of these purposes are null and void.

1983 Ga. Const. Art. VII, §I, Para. I. See also 1976 Const. Art. VII, §I, Para. I; 1945 Const. Art. VII, §I, Para. I; 1877 Const. Art. IV, §I, Para. I. Thus, since 1877, the Georgia General Assembly has had no power to grant an irrevocable tax exemption, and

> [a]ll parties whomever ... are charged with knowledge of all constitutional limitations which Georgia has placed upon the powers of her legislature .... [A]n act of the legislature which contravenes the Constitution ... [is] by the State Constitution declared void .... The Constitution denies to the legislature the power to surrender the sovereign right of the State to tax [Art. VII, §I, Para. I]. Nothing the legislature does, no matter how unambiguously it is expressed, can have

validity if it offends [Art. VII, §I, Para. I].

IBM Corp. v. *Evans*, 213 Ga. 333, 335 (99 SE2d 220) (1957). If, by passage of the Teacher Retirement Act and the Employees' Retirement Act the General Assembly bestowed an *irrevocable* tax exemption upon the retirees, that tax exemption was invalid under the Georgia Constitution, and the retirees would have no vested right to an exemption which they were never entitled to receive. See *Tate* v. *Teacher Retirement System*, 257 Ga. 365 (1) (359 SE2d 649) (1987). The constitutional provision, however, does not prohibit a *revocable* grant of a tax exemption. See *Felton* v. *McArthur*, 173 Ga. 465, 471 (160 SE 419) (1931). We must therefore focus on whether the statutory tax exemptions are irrevocable.

2. The retirees agree that Art. VII, §I, Para. I prohibits the legislature from granting an irrevocable exemption from

state income taxation, and maintain that the drafters of the 1877 [*sic*] intended the provision to prevent only *perpetual* or *permanent* tax exemptions. They contend that the income tax exemption granted each of them is not a forbidden permanent grant of tax exemption in perpetuity, but an acceptable non-perpetual exemption of limited duration that will terminate as payment of retirement benefits to each employee ceases. Thus, the retirees argue, the tax exemption is not irrevocable because the tax-free benefits will not be paid to or on behalf of each retiree in perpetuity. The State asserts that the retirees' definition of "irrevocable" is not that ascribed to it by the drafters of the Constitution of 1877.

The scope of the predecessor of Art. VII, §I, Para. I was discussed at the Constitutional Convention of 1877, which wrote the Constitution of 1877. Delegate Robert Toombs stated that the right to tax

provision

> applies to everybody under the sun. This applies alike to corporations, individuals, and the federal government itself.

Small, *A Stenographic Report of the Proceedings of the Constitutional Convention held in Atlanta, Georgia, 1877.* In *Felton*, supra, at 471-472, the Court noted that

> prior to the adoption of the constitution of 1877 the legislature had indulged in the practice of exempting certain corporations and taxpayers from the payment of taxes .... It was the purpose of the makers of the constitution to deny to the legislature the power to grant exemptions from taxation by laws, contracts, or any other acts .... Its purpose was to prohibit exemptions from taxation, and to make void all limitation of every kind and character upon the taxing power of the State.

In *Nash* v. *National Preferred Life Ins. Co.*, 222 Ga. 14 (2) (SE2d) (1966), this court examined Art. VII, §I, Para. I, and concluded that "irrevocable," as used therein, meant "incapable of being revoked." In

light of the history of the passage of Art. VII, §I, Para. I, we cannot agree with the employees' interpretation of "irrevocable." That the retirement benefits paid to each retiree will not be paid to or on behalf of that retiree in perpetuity does not render the tax exemption revocable. As to each of these retirees, the tax exemption is irrevocable, and that is untenable in light of Art. VII, §I, Para. I. We therefore conclude that HB No. 1 EX is not an unconstitutional impairment of the retirees' contract with the State.[1]

3. Since we are dealing with "a matter of local policy, like a system of taxation," and the construction placed upon a state statute by this court should be respected

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[1] The holding in *Quillian* v. *Employees' Retirement System*, 259 Ga. 253 (379 SE2d 515) (1989), dealt with a claim of estoppel and is not controlling as to the issue presented herein, an unconstitutional impairment of the obligation of contract. See *Quillian*, supra, at 254, n. 2.

absent "real oppression or manifest wrong in the result," *Atlantic Coast Line R. Co.* v. *Phillips*, 332 U.S. 168, 170 (67 SCt 1584, 91 LEd 1977 (1946), we [*sic*] do not find HB No. 1 EX to violate the U. S. Constitution's prohibition against state laws that impair the obligation of contract (Art. I, §10).

4. In light of the above holdings, the trial court did not err in denying appellants' motions for class certification and the establishment of an escrow fund.

Judgment affirmed. All the Justices concur, except, Smith, P.J. and Bell, J., who dissent.

SMITH, Justice, dissenting.

The purely personal issues in this case involve the women and men who willingly devoted their time, energy, and youth to shape the destiny of Georgia. Anyone who grew up in Georgia will personally know many of these people, they include: all

the teachers who have guided our lives, our children's lives, and in some cases our grandchildren's lives. Now that these retirees have exhausted their youth and earning potential for the benefit of the state, the state, for the first time in its history, turns a cold shoulder to those it has always constitutionally protected. The state has attempted to forge a sword from a shield that was intended to protect these retirees.

The trial court erred in holding that Art. VII, Sec. I, Par.I of the 1983 Georgia consitution bars the contract between the state and the retirees. The contract, in the form of a statutory exemption, was merely a method the General Assembly elected to use in distributing the retirees' constitutionally protected retirement benefits. Art. VII, Sec. I, Par. I, was never intended to, nor can it, limit the General Assembly's express power

to distribute constitutionally guaranteed retirement benefits.

A look into the history of the 1877 and the 1945 constitutions demonstrates that Art. VII, Sec. I, Par. I, was ratified to protect the state treasury and the retirees. Its purpose was to stop corporate tax immunity so that the previously immune tax dollars could go into the treasury and then to the retirees.

Although the 1877 constitution was repealed in its entirety by the 1945 constitution, *Wheeler* v. *Trustees of Fargo School Dist.*, 200 Ga. 323, 330 (37 SE2d 322) (1946), it was the instrument that gave life to Georgia's strong state policy of providing benefits to those who benefit the state.

THE LEGISLATIVE HISTORY OF THE 1877 CONSTITUTION

The 1877 constitution was Georgia's attempt to re-establish self-government after the Reconstruction period. *Con-*

stitutional Law, § 43 Ga. E. L. The 1877 Georgia constitution provided that one of the purposes of state taxation was to provide benefits for those who had assisted the Confederate States during the war. The drafters were concerned with the General Assembly's practice of granting tax immunity to corporations, especially railroads.[1] They wanted to stop the practice so that there would be money in

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[1] During the convention, Mr. Toombs, one of the drafters said: "You have virtually taken away so much of the life of the state and given it to these corporations for their support. Without taxation and full control over the power of taxation, the state cannot support her militia, hold her courts of justice, defend the people, and *preserve the rights of society*. You cannot administer your laws or *legislate for the benefit of the people*, or do anything else connected with the government. When this power of taxation is gone and when you say that the legislature can give this power away to them, you then and there put yourself in the power of these corporations ...." (Emphases supplied.) Smalls, S. W., *A Stenographic Report of the Proceedings of the Constitutional Convention held in Atlanta, Georgia 1877*, at 385.

the treasury to benefit those who benefited the state.

THE 1877 CONSTITUTION
The Provisions related to Taxation

The 1877 constitution is divided into only 13 Articles, and two of them relate to taxation. Article IV "Power of General Assembly over Taxation, etc.," and Article VII "Finance, Taxation, and Public Debt." A close examination of the placement of the provisions, their purpose, and other constitutional provisions ratified at the same time, reveals that the state was profoundly interested in obtaining tax revenue from those corporations who were profiting from being in the state in order to provide tax revenues for the benefit of those individuals who benefited the state.

Article IV, "Power of the General Assembly over Taxation, etc." is composed of two sections: "Section I Taxation" contains one paragraph that limits the General Assembly's power of taxation. (This is the

Article that the trial court held bars the contract.) "Section II Regulation of Corporations" contains seven paragraphs, five of which are concerned exclusively with *corporations*. The placement alone, indicates the drafter's main concern was stopping corporate tax immunity.

Article VII, "Finance, Taxation, and Public Debt," in pertinent part, expressed the strong state policy in favor of benefiting those individuals who benefited Georgia. Art. VII, Sec. I, Par. I, declared that one of the purposes of taxation was to provide for injured or disabled Confederate soldiers and their widows.[3] This provision announced the

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[3] "ARTICLE 7. Finance, Taxation, and Public Debt. Section 1. Power of Taxation. §5882. (5180.) Paragraph 1. *Taxation, how and for what purposes exercised.* The powers of taxation over the State shall be exercised by the General Assembly for the following purposes only: .... To supply the soldiers who lost a limb, or limbs, in the military service of the Confederate States, with substantial artificial limbs during life, and to make suitable

state's intention to allow certain individuals a constitutional right to share in the state's tax revenues.

The 1877 constitution manifests the strong policy of Georgia to protect those individuals who have benefited the state, provide them with a constitutional right to share in the state's tax revenues, some of which would come from stopping the corporate tax immunity practice, and stop the General Assembly from granting future corporate tax immunity.

THE 1945 LEGISLATIVE HISTORY

The new constitution intended, among other things, to provide tax revenue for the state's teachers. The legislative

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provisions for such Confederate soldiers as may have been otherwise disabled, or permanently injured in such service, or who, by reason of age and poverty, or infirmity and poverty, or blindness and poverty, are unable to provide a living for themselves; and for the widows of such Confederate soldiers as may have died in the service of the Confederate States, or since, from wounds received therein or disease contracted therein ...." 1877 Constitution of the State of Georgia, §5882 Code of Georgia, 1895 [*sic*].

history also exhibits the drafters' concern with corporations, especially railroads, being immune from state taxation.[4] The new Georgia constitution, as drafted, contained a constitutional guarantee that state tax revenue would be used to assist the state's teachers when they retired. Art. VII, Sec. I, Par. I, as ratified, was intended: "To authorize the levy of taxes for, and to make provision for the payment of benefits and other costs under a teacher's retirement system of Georgia." *1877 Constitution of the State of Georgia as amended through 1943.*

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[4] Former Governor Arnall, Chairman of the committee, said: "I have no antipathy whatsoever, no hatred in the least, no feeling against any corporation in the State. I want each and every one in Georgia to flourish, to become profitable and be able to maintain their business standards *so that they may be of service to the people of Georgia, and may assist us in developing this State to the fullest extent* .... The Georgia Railroad, no matter how much money they make-- ... for the one hundred years they have operated with immunity. They have made ... fortunes ...." (Emphasis supplied.) *Vol. I, Records of Constitutional Commission, 1943-44* at pp. 188-8 and 211 [*sic*].

THE 1983 LEGISLATIVE HISTORY

During the discussion of Art. VII, Sec. I, Par. I of the 1983 Georgia constitution, the committee discussed the history of the provision and the problems that had been created by granting tax immunity to corporations, especially railroads. *Select Committee on Constitutional Revision, Committee to revise Article VII Section I,* pp 1-6.

THE 1983 CONSTITUTION

The placement of the constitutional provisions is important to this decision. Article III of the constitution is entitled "Legislative Branch." Art. III, Sec. VI, Par. I provides:

> The General Assembly shall have the power to make all laws not inconsistent with this Constitution, and not repugnant to the Constitution of the United States, which it shall deem necessary and proper for the welfare of the state.

The General Assembly is to be absolutely unrestricted as long as it does not enact

laws which are inconsistent with the state and federal constitutions. Art. III, Sec. VI, Par. III forbids the General Assembly from abridging its own powers. Art. III, Sec. X, Par. I entitled "Retirement Systems" provides:

> Public funds may be expended for the purpose of paying benefits and other costs of retirement and pension systems for public officers and employees and their beneficiaries.

Although Art. III, Sec. VI, Par. I, above gives the General Assembly the general powers to enact any laws not in conflict with the constitutions, the "Retirement Systems" provision grants the General Assembly the specific power to use state tax revenue to pay retirement benefits and costs.

Article VII of the constitution is entitled "Taxation and Finance." Art. VII, Sec. III, Par. I, provides that the power of taxation may be for any purpose authorized by law. One purpose specifically

authorized, representing Georgia's public policy of providing tax benefits to those who benefited the state, is in Art. III, Sec. X, Par. I, as set out above, this constitutional provision grants the General Assembly the power to use tax revenue to pay the benefits and costs of a retirement system and grants the retirees a constitutional share of the state's tax revenue.

The basic flaw in trial court's holding that Art. VII, Sec. I, Par. I, barred the contract between the retirees and the state can be seen by looking to the specific purpose of taxation in Art. III above and the limit on the General Assembly as set out in Art. VII, Sec. I, Par. I:

> The state may not suspend or irrevocably give, grant, limit, or restrain the right of taxation and all law, grants, contracts, and other acts to effect any of these purposes are null and void. *Except as otherwise provided in this Constitution,* the right of taxation shall always be under the complete control of the state.

Art. III is the provision that "otherwise" provides. The General Assembly is constitutionally authorized to use tax revenue to pay "benefits and other costs." Art. III also gives the retirees a constitutional right to share in the state tax revenue. Only when a law is an attempt to "effect" the purpose of irrevocably restraining the right of taxation is the law declared void. The statutes (the contracts in question) that are in the form of tax exemptions, are tax benefits. Because the retirees are constitutionally guaranteed a right to share in the state's tax revenue, and the General Assembly is constitutionally empowered to use tax revenue to pay "benefits and costs," the General Assembly can chose any method it wishes to accomplish these constitutional purposes. By electing to distribute a portion of the benefits in the form of exemptions, the state avoided the

costly administrative expenses involved in tax collection. Each administrative expense eliminated becomes a savings for the state.

In construing the constitutionality of an act, every presumption is to be made in favor of its constitutionality until it is shown to be unconstitutional. As expressed in *Park* v. *Candler*, 114 Ga. 466, 472 (40 SE 523) (1901):

> Acts of a legislature constitutionally organized are to be presumed to be constitutional, and it is only when they *manifestly* infringe some of the provisions of the constitution, or violate the rights of the citizen, that their operations should be impeded by judicial power ... A solemn act of the government will not be set aside by the court in a doubtful case. The incompatibility or repugnancy between the statute and the constitution, must be clear and palpable .... Before an act of the General Assembly of the State, assented to by the executive, is declared null and void, the judicial branch of the government should be clearly satisfied. If it be at all doubtful, the doubt most assuredly should turn the scale in favor of the construction which the other branches of our State government

have given to the construction. [Cits. omitted.]

The restriction on the General Assembly found in Article VII, Sec. I, Par. I, was never intended to, and cannot, limit the express constitutional power of the General Assembly. If it is so read, it conflicts with Article III, Sec. X, Par. I of the constitution, and it must yield to Article III. Article III, Sec. X, Par. I guarantees the retirees a share of state tax revenue, and expressly gives the General Assembly the power to use tax revenue for the purpose of "paying benefits and other costs of retirement and pension systems." Article VII, Sec. I, Par. I, cannot destroy the General Assembly's express constitutional power, nor can it be used to restrict the method by which [the] General Assembly exercises that power. The majority's destruction of that power is unconstitutional.

Once the power was granted by the

constitution, the method of exercising the power was left to the circumspection of the General Assembly with the knowledge and understanding that the protection of people and their property is the paramount duty of the state. Art. I, Sec. I, Par. II, 1983 constitution of the state of Georgia [*sic*].

The retirees bore their just share of the cost of government. They have paid income tax, property tax, ad valorem tax, city and county and municipality taxes, sales tax and other forms of taxes. They contributed to the system from which they now wish to obtain their deferred compensation as promised. They have reasonable expectations and they have faithfully relied upon constitutional and statutory law, and the assurances of all three branches of Georgia government.[5] Art. VII,

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[5] What other assurances might be needed? The retirees have constitutional protection and the

Sec. I, Par. I, was intended to benefit these individuals, it was never intended to be used against them to deprive them of

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legislative branch, general assembly, and executive branches, the governor, approved the statutes (contracts) as enacted. Long after the statutes were in place, the judicial branch, this Court, held "[A] statute establishing a retirement plan for government employees becomes a part of the employee's contract of employment ...." *Withers v. Register*, 246 Ga. 158 (269 SE2d 431) (1980), see also *Swann v. Board of Trustees &c.*, 257 Ga. 450 (360 SE2d 395) (1987). The executive branch, the attorney general, stated: "It is clearly the law of this state that a statute establishing a retirement plan for government employees becomes a part of an employee's contract of employment .... Any type of restriction, reduction or divestiture of statutorily granted retirement rights would be precluded or restricted by the constitutional prohibitions forbidding the impairment of contracts." Op. Att'y Gen. U85-3. "The federal Impairment Clause has also clearly been extended to the protection of contractual rights granted by state laws establishing retirement plans for public employees and has been applied by the U. S. Supreme Court to prevent the operation of a state statute impairing the obligation of a contract for retirement benefits." Op. Att'y Gen. U83-72.

their constitutional rights. To paraphrase a portion of Justice Black's dissent in *FPC* v. *Tuscarora Indian Nation*, 362 U.S. 99, 142 (80 SC 543, 4 LE2d 584) (1960): "Great [States], like great men, should keep their word."

RELIANCE AND ESTOPPEL

When former Judge Quillian "relied" on the law, we held that the state was estopped to deny his benefits. *Quillian* v. *Employees' Retirement System of Georgia*, 259 Ga. 253 (379 SE2d 515) (1989). This Court respected his expectation interest and we should likewise respect the expectation interest of these retirees. In comparing the facts of the *Quillian* case to the facts before us today, we find, that Judge Quillian was informed by the Employees' Retirement System, while he was still employed with the State, that he had had the requisite time in for full retirement benefits. Based upon this

assurance he retired. Some months later he was notified that the Employees' Retirement System had reevaluated his retirement time and he did not have the requisite 34 years for full retirement, and his retirement benefits were reduced. This Court, in reversing a trial court's holding favorable to the Employees' Retirement System, on the basis of estoppel, stated in *Quillian* at 254:

> 4.(a) All parties to this case acknowledge that Judge Quillian did everything within his power to ascertain his retirement benefits *prior* to the time he submitted his resignation; that the retirement system calculated his benefits; that he relied expressly upon this calculation; that he so stated in his letter of resignation to the governor; that the resignation was accepted by the governor; that the calculated benefits were paid to him for a period of time after his retirement; and that his act of retirement was final and irreversible.3 (Cits.) [*sic*]

This Court held that the Employees' Retirement System could be estopped because the act was within its power and it was

required by "right and justice." Id. at 255.

No one disputes that the retirees met the standard set out in Division 4(a) of the *Quillian* opinion. (See above.) In deciding former Judge Quillian's case we held that "right and justice" required the state to be estopped. These retirees are entitled to the same "right and justice."

THE CONTRACT BETWEEN THE RETIREES AND THE STATE

The statutes enacted by the General Assembly are contracts between the state and the retirees. As stated in *Withers* v. *Register*, 246 Ga. 158, 159 (269 SE2d 431) (1980):

> Long before the rule was recognized generally by the courts of the several states, *it was the law of this state that a statute or ordinance establishing a retirement plan for government employees becomes a part of an employee's contract of employment* if the employee contributes at any time any amount toward the benefits he is to receive, and if the employee performs services which

> the law is in effect; and that the impairment clause of our constitution [ ] [*sic*] precludes the application of an amendatory statute or ordinance in the calculation of the employee's retirement benefits if the effect of the amendment is to reduce rather than increase the benefits payable .... [*I*]*f the employee performs services during the effective dates of the legislation, the benefits are constitutionally vested, precluding their legislative repeal as to the employee* .... (Emphases supplied.)

As the majority opinion recognized, the "law became part of the contract of employment of the retiree." (Majority op. at 2) Those contracts cannot be impaired without violating the constitutions.

The majority opinion creates a conflict between Art. III, Sec. X, Par. I, and Art. VII, Sec. I, Par. I of the constitution. The opinion also limits the constitutionally granted power that rested in the General Assembly to use any method it chose in fulfilling its constitutional obligation to the retirees. It ignores the retirees' reliance upon the public policy

of this state that has until today given them constitutional protection, Art. III, Sec. X, Par. I, and it ignores the retirees' reliance on their contracts with the state. See *Withers*, supra. The reliance interest of Judge Quillian was upheld by this Court, *Quillian*, supra; however, the reliance interest of these retirees is ignored.

The United States Supreme Court has declared that it should be slow in departing from the judgment of a state court in a matter of local policy, like a system of taxation, unless there is "real oppression or manifest wrong in the result." *Atlantic Coast Line Railroad Co.* v. *Phillips*, 332 U.S. 168, 170 (67 SC 1584, 91 LEd 1977) (1946). However, the Court, quoting *Clyde* v. *Gilchrist*, 262 U.S. 94, 97 (43 SC 501, 67 LEd 883) (1923) also said: But the court has also said:

> A claim that a State statute impairs the obligation of

> contract is an appeal to the United States Constitution, and cannot be foreclosed by a State court's determination whether there was a contract or not or what were its obligations .... [*sic*]

This case does not just involve a system of taxation. With today's opinion this Court has unconstitutionally limited the constitutionally granted power of the General Assembly to use whatever method it desires in paying retirement benefits and costs, it has ignored the contract between the retirees and the state in violation of state and federal constitutional law, and it has failed to recognize the doctrine of estoppel for the benefit of these retirees when it so recognized the doctrine for the benefit of a former judge. The impairment of the retirees' contracts is oppressive and manifestly wrong.

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APPENDIX

Denial by Supreme Court of Georgia of Motion for Reconsideration

SUPREME COURT OF GEORGIA

ATLANTA DECEMBER 19, 1990

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

Case No. S90A0575

EMORY C. PARRISH ET AL. V. EMPLOYEES RETIREMENT SYSTEM OF GEORGIA ET AL.

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

All the Justices concur, except Smith, P.J., and Bell, J., who dissent.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta
I certify that the above is a true extract from the minutes of the Supreme Court of Georgia. Witness my signature and the seal of said court affixed the day and year last above written.

Joline B. Williams, Clerk.